



BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION

Advisory Opinion No. 07-05-008

The Ethics Law and the County's Administrative Procedures Act (APA) provide quasi-judicial officials with instructions on how to handle ex parte or private communications they receive related to matters pending before them. A member of the Board of Appeals, a quasi-judicial entity, asks how this rule applies when someone approaches the Board "to discuss [a] case" after the Board has rendered its decision, but while the case is pending on appeal in the courts. The Commission cannot determine whether this communication meets the definition of an ex parte communication because the Board has not provided any description of that communication. However, if the Board determines that this communication meets the definition of an ex parte communication, then the Board must maintain the substance of that communication in the case file and, in the event of any remand to the Board, treat it in accordance with the provisions of the APA.

An ex parte communication is any communication received by an employee regarding a matter that the employee must decide on the basis of a record after giving interested parties an opportunity for a hearing. An employee so tasked is acting in a quasi-judicial capacity. Both the Ethics Law and the APA prohibit quasi-judicial officials from considering ex parte or private communications.¹ Section 19A-15(b) of the Ethics Law states:

A public employee must not consider any ex parte or private communication regarding any matter that must be decided on the basis of a record after giving interested parties an opportunity for a hearing. The recipient must incorporate any ex parte or private communication in the record. If the communication was oral, the recipient must write down the substance of the communication and enter it into the record. The decision-making body may consider ex parte or private communications if all parties are given an appropriate opportunity to respond.

This subsection does not apply to:

- (1) advice rendered by an attorney for the County;
- (2) advice rendered by appropriate officials or staff of County or other government agencies; and
- (3) discussions between members of a decision-making body.

¹ The Board of Appeals is also subject to its own code of ethics. § 2-109. Subsection (e) provides that the Board must handle any ex parte communication it receives related to any contested case in accordance with the APA.

To similar effect is § 2A-8(b)(2) of the APA. The Act applies to the Board of Appeals² (and most other quasi-judicial entities in the County):

- a. This paragraph applies to any ex parte or private communication, written or oral, received by a member of a hearing authority if:
 - (i) the communication relates to a contested matter before the hearing authority;
 - (ii) all appellate rights regarding the contested matter have not been exhausted; and
 - (iii) the hearing authority is required by law to make a decision on the matter based on the record before it.
- b. This paragraph does not apply to:
 - (i) legal or technical advice rendered by government agency staff or an attorney for the County at the request of the hearing authority;
 - (ii) any communication about the status or procedure of a pending matter or;
 - (iii) any communication between members of the hearing authority.
- c. If a member of a hearing authority receives an oral ex parte or private communication, that member must reduce the substance of the communication to writing within a reasonable time after receipt of the communication.
- d. If a final administrative decision has not been made prior to receipt of the ex parte or private conversation, the hearing authority must send a written notice to all parties that discloses the contents of the communication and states whether the hearing authority will consider the communication as a basis for its decision under subparagraph e.
- e. The hearing authority must include the ex parte or private communication in the record and may:
 - (i) consider the communication as a basis for its decision after giving all parties an opportunity to respond to the communication; or
 - (ii) decide the matter if the hearing authority expressly finds that it has not considered the communication as a basis for its decision.
- f. The substance of an ex parte or private communication received after a final administrative decision and before appellate rights have been exhausted must be maintained in the case file and, in the event of any remand, treated in accordance with all other provisions of this paragraph.

As an initial matter, the Board's letter does not indicate the substance of the communication. The letter states that someone approached several Board members "to discuss

² Technically, the APA applies to the Board of Appeals only when it hears administrative appeals, and not when it hears variances or special exceptions. In those instances, the Board's own rules of procedure would apply. Montgomery County Code Appendix J. But § 2-109 makes clear that the Board is to follow the APA when handling ex parte communications it receives in any contested case, including variances and special exceptions.

[a] case” where the Board had already issued a decision, but an appeal was still pending in the courts. As is clear from the Ethics Law and the APA, not every communication with a quasi-judicial official is a prohibited ex parte communication (*e.g.*, communication about the status or procedure of a pending matter). The Board will have to determine whether this communication falls within the prohibition against the consideration of ex parte communications.

If the Board determines that the communications fall within the definition of an ex parte communication, then its obligation is clear. Section 2A-8(b)(2)(f) of the APA directs the Board to maintain the substance of that communication in the case file and, in the event of any remand to the Board, treat it in accordance with all other provisions of the APA.

Finally, the requester also asks whether the lobbying provisions of the Ethics Law are implicated in this matter. They are not, because the lobbying provisions do not apply to attempts to influence a quasi-judicial body. The lobbying provisions restrict communications to influence legislative, executive, or administrative action. §§ 19A-4(k) and 19A-21(a). This conclusion is further bolstered by the exclusion from the lobbying law of legislative action covered by § 19A-15(b).³

In reaching this decision the Commission has relied upon the facts as presented by the requester.

FOR THE COMMISSION:



August 31, 2007

Date

Richard N. Reback, Chair

³ Thus, when the County Council acts in a quasi-judicial capacity (*e.g.*, local map amendments), communications to influence the Council are subject to the ex parte rules rather than the lobbying rules.